IN THE

Supreme Court of the United States

October Term 1950

No. .....

FRANK CAMPBELL LITTLETON, *Petitioner*

vs.

ROBERT H. MCNEILL, ET AL., *Respondents*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION

(The brief in support of this Petition begins at page 15 All emphasis in both Petition and Brief is supplied unless stated otherwise.)

To the Honorable Fred M. Vinson, Chief Justice, and the Associate Justices, of the Supreme Court of the United States.

Your petitioner respectfully shows:

I

A SUMMARY STATEMENT OF THE MATTER INVOLVED

1. The Issues

First Issue. The courts below held that an attorney for a farmer debtor, who has been adjudicated a farmer debtor bankrupt, may purchase a pending secured claim against the farmer debtor, and thus become his creditor as well as being his legal counsel. The petitioner contends it is contrary to a long established rule of English and American jurisprudence that an attorney must not purchase a claim against his client.

Second Issue. The lower courts held that an attorney for a farmer debtor, who has been adjudicated a farmer debtor bankrupt, may pocket a profit from the purchase of a pending claim against his client. The petitioner contends that such profit, here 106%, being $19,840.27, inures to the client.

Third Issue. The lower courts held that one who knowingly joins with the attorney in purchasing a claim against his client may share in the profit made out of such purchase. The petitioner maintains that he may not.

Fourth Issue. Whether secured claims against a farmer debtor bankrupt bear interest after the date of the adjudication and if they do, whether they bear interest (a) after the sale of the security, or (b) after the proceeds are paid into court.

Fifth Issue. Whether a secured claim against the farmer debtor bears interest after the full amount secured is paid into court and the farmer debtor moves the court to pay such claim with interest to the date of the action.

Sixth Issue. Whether a trustee in a Virginia deed of trust (real estate mortgage) who did not execute the trust may recover any compensation or commission.

Seventh Issue. Whether an attorney for an individual who is both sole holder of a note secured by a deed of trust (real estate mortgage) and also trustee thereunder, may receive compensation for his services out of the security or other property of the grantor mortgagor.

Eighth Issue. When the property in controversy, is $45,954.52 in money and its disposition is the only question involved and there is held in the custody of the court $216,110.35, whether the court may decline to accept a supersedeas bond and withhold the entire $216,110.35 in lieu thereof, thus preventing disbursement of money which is not in controversy and the stopping of further claims for interest, etc., especially when the farmer debtor petitioner requested the disbursement thereof at the time the undisputed amounts due were determined.

Ninth Issue. Whether in a farmer debtor proceeding appraisers may be paid without any order of the court fixing the amount of compensation when there is no evidence of the amount of services rendered.

Tenth Issue. Whether in a farmer debtor proceeding the sheriff of a state court may be allowed compensation without any evidence to support a claim therefor.

2. The Statutory Law

The statute involved is Section 75 of the Bankruptcy Act; 11 USC 203, known as the Farmer Debtor Law, and such other portions of the Bankruptcy Act, 11 USC, as may be applicable.

3. The Decisions of the Courts Below

The opinion of the District Court is not reported. It appears at R 60A.

The opinion of the Court of Appeals is reported in 179 F 2d 848. It appears at R 118.

4. The Applicable Facts and Procedures

"OAK HILL"

Many years prior to 1941 Mr. Frank Campbell Littleton purchased "Oak Hill", the country residence estate of President James Monroe, in Loudoun County, Virginia, comprising about 1700 acres. R 9A, top of page. R 13A, paragraph (a). R 16A, seventh and eighth lines from the bottom. Opinion of District Judge at R 60A, beginning six lines down. R 118, second page of printed opinion of Court of Appeals second paragraph of opinion. In the Mansion House on this estate were assembled a great number of articles of historical significance. R 29A. R 61A, first sentence of last paragraph.

FARMER DEBTOR PROCEEDINGS

On June 19, 1941, Mr. Littleton filed his petition as farmer debtor in the District Court below under Sec. 75 of the Bankruptcy Act, being Title 11, Sec. 203, USC. R 46A, ninth line from the top.

SALE OF "OAK HILL"

In the course of administration of the proceedings the "Oak Hill" real estate was sold for $220,000.00 leaving $216,111.35 net after expenses were paid. This money came from the *real estate*. R 47A, paragraph at bottom of page, and top of R 48. The chattels, consisting of thousands of articles of historical value appraised at $21,612.00 were not sold. R 61A, first sentence of last paragraph. R 52A, the third short paragraph.

MOTION TO PAY ALL FIRST LIENS

On February 15, 1949 the farmer debtor, Mr. Littleton, filed his motion stating that the first trust lien creditors

had rendered a statement of all amounts due them to date, totaling $136,788.14, and moving that said first liens be paid in full in the amounts claimed by them so that interest would stop accruing. R 8A. As shown in the next paragraph below in this statement, the Order of Distribution of the proceeds of the real estate entered by the court showed more than $23,000.00 in the hands of the court in excess of all claims, costs and expenses. R 74A to 76A. That is there was $23,000.00 more than enough to pay all debts, costs and expenses.

The court took no action upon this motion, indicating by his letter to counsel on February 21, 1949 (R 10A) that notwithstanding that not only was there plenty of money to pay the first liens in full but also to pay all debts, he would nevertheless order a meeting of all interested creditors to determine the amount due each of them and submit a "scheme of distribution." That order is at R 11A. Thus the interest continued to run on all of the $136,788.14 first liens until the Order of Distribution.

THE "SCHEME OF DISTRIBUTION"

Pursuant to the order at R 11A, referred to in the preceding paragraph, the conciliation commissioner after a creditors meeting filed his "Scheme of Distribution" on April 13, 1949. R 47A. This included certain payments of $4800.00 to himself and the payment of all costs and expenses out of the sale of the "Oak Hill" real estate. It showed a balance of $21,506.08 remaining to be paid to the farmer debtor, Mr. Littleton.

THE ORDER OF DISTRIBUTION

The Order of Distribution of the proceeds of the real estate based upon the conciliation commissioner's "Scheme of Distribution" provided for all debts and all costs and expenses, and showed a remaining balance of $23,595.47 to be paid to Mr. Littleton the farmer debtor. R 76A,

paragraph (Q). The Court of Appeals reduced the costs and expenses by $3666.53, thus increasing the amount remaining out of the proceeds of the real estate to $27,262.00, over and above all debts, costs and expenses. (And this left intact and unsold the chattels appraised at $21,612.00. R 61A, first sentence of last paragraph. R 52A, the third short paragraph.)

ALL PROCEEDS RETAINED BY COURT

In the appeal by the farmer debtor, Mr. Littleton, the parties moved the District Court to fix a supersedeas bond to be executed by him. Instead the court ordered the entire amount of the proceeds of the real estate to be retained in the registry of the court "pending the outcome of the appeal herein," and that the surplus over the "debts, interest and costs" be held "in lieu of" a supersedeas bond". R 79A to 80A.

ATTORNEY McNEILL AND COLEMAN C. GORE PURCHASE THE NOTES, MORTGAGES AND JUDGMENT AGAINST ATTORNEY McNEILL'S CLIENT, MR. LITTLETON, SR.

(Note. It is important to an understanding of this subject to know that two Frank C. Littletons are involved (1) Frank C. Littleton, sometimes referred to as Frank C. Littleton, Sr., and (2) Frank C. Littleton, Jr.).

Among the claims against the farmer debtor Frank C. Littleton, there was a non-negotiable note secured by two mortgages, namely a second mortgage on the "Oak Hill" real estate and a first mortgage on the "Oak Hill" chattels, also a judgment against him. Both claims were owned by Frank C. Littleton, Jr. The principal of the note was $27,200.92 and the judgment was for $1,844.38. R. 85. This note and judgment were ordered paid in full by the District Court in the total sum of $38,440.27 (note $38,406.26; balance then due on judgment $34.01). R. 75A.

On appeal this allowance was affirmed. Opinion of Court of Appeals. R 128 to R 133.

This payment of $38,440.27 was ordered to be made, not to Frank C. Littleton, Jr. the original owner, but to Robert H. McNeill, (the attorney for the petitioner, Frank C. Littleton, Sr.) and Coleman C. Gore. R. 75A, item F (1) (2). It had been assigned to them by Frank C. Littleton, Jr. on February 5, 1948 for $18,600.00. R 16A. This purchase price was a little more than 48% of the client's debt, making a profit of $19,840.27 or 106% of an investment of $18,600.00 for fifteen months.

APPRAISERS' FEES

In the order of distribution six appraisers were ordered to be paid a total of $750.00 for appraising real estate and chattels. R 74A, Item A, (1) to (6). The farmer debtor promptly filed his objections to these payments stating: (1) no basis or rate of compensation was ever set by the conciliation commissioner or by the court, (2) the fees of $100.00 and $150.00 each was extravagant and (3) no claim or proof was filed or presented to the conciliation commissioner at the hearing ordered by the judge. These statements were never controverted. R 54A, Section I.

ALLOWANCES TO TRUSTEES IN STATE COURT

The Order of Distribution allowed $1000.00 to a trustee under the deed of trust. R 75A, Item D. This was for services in the State proceedings in which the trust was never executed. The farmer debtor objected to such payment for the reasons: (1) such a trustee's compensation is conditioned upon a sale of the security and there was no sale, and (2) no claim for such compensation was filed. R 56A, Section III. These statements were not denied.

ALLOWANCE TO ATTORNEY FOR TRUSTEES IN STATE PROCEEDINGS

Two trustees were named in the deed of trust. One of them, Rust, was the sole owner of the note secured by the trust. Both started foreclosure in state proceedings which proceedings were stopped upon objection of the mortgagor (grantor). This trustee then resigned and the other trustee (mortgagee) proceeded with the foreclosure until stopped by the filing of the mortgagor's petition as a farmer debtor in the federal court. The "Scheme of Distribution" recommended for the attorney for these trustees a fee of $500.00 for representing both trustees in the state court. R 50A, Item 17. The Order of Distribution allowed it. R 75A, Section (E). The farmer debtor objected to this payment upon the ground that the attorney's representation in the state court of the sole note holder and at the same time the trustee was inconsistent and therefore not compensable. R 56A, Section IV.

SHERIFF'S FEES

In the federal court trustees were appointed to make sale of the "Oak Hill" real estate. Upon their report of sale, the court ordered $673.00 to be paid to the state sheriff. R 2A, Item 5. The conciliation commissioner in his "Scheme of Distribution" recommended and the Order of Distribution allowed $50.00 to the same sheriff "as per bill attached" for "protection" of the property before the "trustees took charge" R 51A, Item 21. The farmer debtor objected to this allowance because there was no evidence of any such services. R 57A, Section VI. The statement that this $50.00 was in addition to the $673.00 is found in the court's statement at R 70A, Section VI.

II

STATEMENT OF THE BASIS OF THE JURISDICTION OF THIS COURT

The jurisdiction of this Court is conferred by Title 28 USC, Section 1254. (Formerly Section 240 (a) of the Judicial Code, 28 USC, Section 347 (a), as printed on page 5 of the Appendix to the Revised Rules of this Court.)

The petitioner has complied with Title 28 USC, Section 2101 (c). (Formerly Section 8 (a) of the Act of February 13, 1925; 28 USC, Section 350, as printed on page 7 of the Appendix to the Revised Rules of this Court.)

The judgment of the court below was entered on January 12, 1950, and was final on that date. This petition for certiorari is filed in compliance with said statute.

III

THE QUESTIONS PRESENTED

This petition for certiorari presents the following questions:

1

May the attorney for a client purchase a secured claim against his client when the security is the property of the client and both client and security are involved in a bankruptcy court in farmer debtor proceedings, and thus at the same time be attorney for the client and own an acquired claim against his client?

2

May such attorney reap the profit from his investment, here 106%, being $19,840.27 within fifteen months, profit, or must he account to his client for such profit?

3

May one who was associated with such attorney in purchasing said secured claim pocket his profit, or must he account to his associate's client?

4

In a farmer debtor proceeding do secured claims bear interest after adjudication, and if so does the interest run either after the sale of the security, or after the deposit of the proceeds into court?

5

If a farmer debtor moves the court to pay undisputed secured claims and the money to pay such claims has been realized from the sale of the security and is in the possession of the court, may the court continue to hold the money and allow interest to run?

6

In farmer debtor proceedings may the trustee in a Virginia deed of trust (real estate mortgage) who did not execute his trust by selling the security, be paid any compensation or commission by the court of bankruptcy in a farmer debtor proceeding?

7

If the trustee named in a deed of trust (real estate mortgage) is sole owner of the security, may his attorney in a case involving objections to his exercising such office of trustee be paid for legal services out of the security or other property of the grantor-mortgagor in a farmer debtor proceeding in a federal court?

8

When the amount in controversy in an appeal from a District Court is $45,954.52 and there is $216,110.35 held

in the possession of the court, may the District Court decline to grant the motion of the parties to fix a supersedeas bond and hold the entire $216,110.35, thus preventing disbursement of the money not in controversy, and permitting the running of interest, especially when the appellant debtor has requested the payment of such sum not in controversy?

9

In a farmer debtor proceeding may appraisers be paid without any order of the court fixing their rate or amount of compensation when there is no evidence of the amount of services rendered?

10

May a sheriff of a state court be allowed compensation by a bankruptcy court in a farmer debtor proceeding without any evidence to support a claim for services?

IV

Reasons For Allowance of the Writ

1

The courts below approved the purchase by an attorney of a secured claim against his client when the claim, the security, his client and the vendor of the claim were all involved in the case in which he represented his client and they awarded a profit of 106% on the principal investment of $18,600.00 for the acquisition of $38,408.36 ordered paid within 15 months after the purchase.

This secured debt was $27,200.92, dated February 4, 1941, at 5% interest. When purchased on February 5, 1948, the amount due was $36,720 and when ordered paid in full as of May 1, 1949, it was $38,406.26. R 50A. Item 18, to which must be added $34.01, in Item 19. Also R 75A, Item F (1) and (2).

This was a profit of over 106% or $19,840.27 on the investment of $18,600.00 for 15 months in the client's debt on which interest meanwhile kept accruing on the $27,200.92. When the claim was bought the attorney and his associate knew the security was ample and the investment was safe. For full discussion see the brief filed herewith at page 24, last paragraph; page 25, first three paragraphs.

These decisions below are counter to the long established rule in Anglo-American jurisprudence that an attorney may not buy up claims against his client and if he does, he may not reap a profit. He holds any profit as trustee for his client.

These decisions in the Fourth Circuit are contrary to the decisions of Courts of Appeals in other Circuits, including the Second and Tenth Circuits. See *Niehart* v. *Buek*, 50 F 2d 367, CCA 10. *Commonwealth Finance Co.* v. *McHarg*, 282 Fed. 560, CCA 2.

They run counter to the most solemn declarations of this court upon the delicate and confidential relations between counsel and client and the duty of counsel and courts to see that they must be zealously guarded. *Texas* v. *White* (*in re Paschal*) 10 Wall. 483, in the middle of the last paragraph of the opinion. *Stockton* v. *Ford*, 11 How. 232, 236. *Michoud* v. *Girod*, 4 How. 551.

This is a question that in the interest of the integrity of the bar and the confidence of the public should be settled by this court. No more solemn duty rests upon bench and bar than to maintain the high standing of the relationships between attorney and client.

2

The decisions below are counter to the decisions of numerous federal and state courts holding that if an

attorney reaps a profit from investment in claims against his client, he holds it as trustee for his client and must account for it. The Second and the Tenth Federal Circuits, in the cases just cited above, are examples of such holdings.

3

Of course the courts below were in error, and against the current of the law, in permitting the attorney's associate to participate with the attorney in the wrongful gain. *Jackson* v. *Smith*, 254 US 587.

4

The important question of whether, and if so when, interest shall be paid upon claims, especially secured claims, after adjudication in a bankruptcy court should be settled by this court. The law generally is no. *Sexton* v. *Dreyfus*, 219 US 339, 344. *City of New York* v. *Saper*, 336 US 328. Here not only was interest permitted to run after adjudication but long after the money to pay the claims, interest and all costs was paid into court, and even after the debtor moved the court to pay them and stop the running of interest. The district court continued to hold such money long after the time for appeal expired, and still holds it.

5

This court should determine the important question of whether a court may hold large sums of money not in controversy when there is ample other money in court to pay all debts and costs. This is particularly true when the parties have requested the court by motion to fix supersedeas bond and thus release all funds. Such withholding of funds is contrary to, and in violation of, Rule 36, paragraph 2, of the Rules of this Court and Rule 73 (d) of the Rules of Federal Procedure promulgated by this court.

This is a matter of great importance to the public and should be decided by this court.

6

It is a matter of interest to the public whether a trustee in a Virginia deed of trust (mortgage), who did not execute the trust, may be paid out of the security. *Dillard* v. *Serpelly,* 138 Va. 694.

7

It is a matter of public interest whether an attorney for a trustee, named in a deed of trust in which the named trustee is sole owner and holder of the secured note, may be paid a fee out of the security.

8

It is also a matter of interest to the public whether appraisers and a sheriff of a state court may be paid without any order fixing compensation or evidence of services. Both the statute, federal court decisions and rules have fixed strict procedures pertaining thereto for the protection of the public. General Order XLV in Bankruptcy of this Court. *In re Kaufman,* 21 F 2d 799. *In re Fidler,* 172 F 2d 635. *Dillard* v. *Serpell,* 138 Va. 694, 703.

Your petitioner accordingly prays that a writ of certiorari issue to the Court of Appeals for the 4th Circuit directing it to certify and send to this court a transcript of the record and of the proceedings thereon so this cause may be finally determined by this court, and for all other proper relief.

Washington
April 10, 1950

Elmer McClain,
Lima, Ohio,
Counsel for Petitioner.

Edgar Allen Prichard
Fairfax, Virginia,
Of Counsel.

BRIEF

In Support of the Foregoing Petition for Writ of Certiorari

I

Report of the Decisions Below

The opinion below is reported in 179 F 2d 848. It appears at R 118.

The opinion of the District Court is not reported. It appears at R 74A.

II

Grounds Upon Which the Jurisdiction of this Court Is Invoked

The basis for the jurisdiction of this court has been set forth at page 9 of the preceding Petition for a Writ of Certiorari.

III

Statement of the Case

"OAK HILL"

Some years prior to 1941 the petitioner, Mr. Littleton, purchased the country estate of President Monroe comprising over 1700 acres in Loudoun County, Virginia, 35 miles from Washington. R 9A, R 13A paragraph (a). R 16A, Opinion of District Judge at R 61A. Mr. Littleton collected and furnished the Mansion House with many articles of great historical value. R 29A. R 61A.

FARMER DEBTOR PROCEEDINGS

In 1941 Mr. Littleton filed a petition as a farmer debtor in the District Court, at Alexandria, Virginia under Sec. 75 of the Bankruptcy Act; Title 11, Sec. 203, USC. R 46A.

SALE OF "OAK HILL"

In 1948 the "Oak Hill" real estate was sold for $220,000.00. After paying the expenses of sale $216,111.35 remained. R 47A to 48A. The chattels, chiefly the historical objects, were not sold; they were appraised at $21,612.00. The opinion of District Judge at R 61A.

PETITIONER'S MOTION TO PAY FIRST LIENS

Upon obtaining a statement of all first liens the petitioner moved in the District Court that they all, amounting $136,788.14, be paid to stop interest. R 8A. It is shown in the Record that there was then over $23,000.00 paid into Court from sale of the real estate security over and above all claims, costs and expenses. R 74A to 76A. It was not done. Instead the court asked the conciliation commissioner to submit a "Scheme of Distribution" in the Order at R 11A. The interest meanwhile has continued to run on the entire $136,788.14 of first liens with plenty of money in court to pay them and all costs and expenses and leave over $23,000.00 besides.

THE "SCHEME OF DISTRIBUTION"

In compliance with the Order the conciliation commissioner submitted his "Scheme of Distribution" which included $4800.00 to himself and payment of all claims, costs and expenses, leaving $21,506.08 remaining to be paid to the petitioner, Mr. Littleton. R 47A. R 52A, last item before total.

THE ORDER OF DISTRIBUTION

Upon considering the "Scheme of Distribution" the District Court by its "Order of Distribution" providing for all claims, costs and expenses found $23,595.47 left to be paid to the petitioner, Mr. Littleton. R 76A, paragraph Q. The Court of Appeals reduced the costs and expenses

by $3666.53 leaving more than $27,000.00 due Mr. Littleton. (Opinion of Court of Appeals: R 118).

This still left intact and free of all liens all of the chattels appraised at $21,612.00. R 52A, second indented paragraph.

ALL MONEYS RETAINED IN COURT

After Notice of Appeal the parties moved the District Court to fix a supersedeas bond to be executed by the petitioner, Mr. Littleton. But the Court ordered the entire amount of money held in Court, $216,111.35, to remain in Court "pending the outcome of the appeal herein" and that the surplus over and above "debts, interests, and costs" be held "in lieu of a supersedeas bond". R 79A to 80A. The effect of the order was to tie up $136,788.14 that was the property of the first secured creditors and not in dispute—not involved in the appeal. R 78A. R 74A to 76A.

ATTORNEY'S PURCHASE OF SECURED CLAIM AND JUDGMENT AGAINST HIS CLIENT

Two Frank C. Littletons, Sr. and Jr., are here involved. It is necessary to distinguish them.

Littleton, Jr., held a secured claim for a non-negotiable note secured by a second real estate mortgage on "Oak Hill" and a first chattel mortgage on all the chattels; he also held a judgment. Not counting interest they totaled $29,045.30. R 2A. And as of May 1, 1949 they totaled $38,440.27 ($38,406.26 plus $34.01). R 75A, Item (F). This was ordered paid by the District Court. R 75A, Item F. It was sustained by the Court of Appeals. R 118.

Fifteen months prior to the Order of Distribution, that is on February 5, 1948 the attorney for the petitioner, the farmer debtor Mr. Littleton, Sr., and the attorney's associate purchased the secured claim and the judgment for $16,800.00 from the son, Mr. Littleton, Jr. R 16A. This

$16,800.00 was just over 48% of the $38,440.27 ordered paid and showed a profit of 106%, or $19,840.27 on the investment, for a period of fifteen months.

APPRAISERS' FEES

The Order of Distribution provided $750.00 for six appraisers of real estate and chattels. R 74A to 75A, Items A (1) to (6). The petitioner filed objections on the ground that (1) no compensation was ever fixed by either the conciliation commissioner or the judge, (2) and the fees of $100.00 and $150.00 each were extravagant and (3) no proof was ever presented. These statements were not questioned. R 54A, Section I.

ALLOWANCES TO TRUSTEES AND THEIR ATTORNEY IN STATE COURT

The Order of Distribution allowed $1000.00 to a trustee named in the deed of trust (mortgage) in the state proceedings never earned because the trust was never executed. The petitioner's objections, (1) that such compensation is conditioned upon sale of the security which never occurred as the proceedings were stayed by the federal jurisdiction under Sec. 75 (n) and (o), and (2) no application for such services was made. R 54A, Section III. These statements were not denied.

The attorney for the trustees in the state proceedings was allowed a $500.00 fee. This was for representation of one trustee who was the sole owner of the note secured by the trust and who upon objection in the state court resigned, and for the other trustee whose attempt at foreclosure was defeated by the federal jurisdiction under Sec. 75 (n) and (o). Both the conciliation commissioner, the District Court and the Court of Appeals allowed this $500.00 fee. R 75A, Items D and E. R 118. The objection of the petitioner that the representative of the sole note holder and the trustee was inconsistent was overruled. R 56A, Sections III and IV.

SHERIFF'S FEES

Upon the report of sale of the real estate the District Court allowed and there was paid $673.00 to the state sheriff. R 2A, Item 5. The conciliation commissioner recommended, the District Court allowed and the Court of Appeals approved $50.00 additional. R 51A, Item 21. R 70, Section VI. The petitioner's objection that there was no evidence of any additional services by the sheriff was overruled. R 57A. R 70A, Sec. VI.

IV

Specification of Errors

1

The Court of Appeals erred in holding that an attorney may purchase a claim against his client in the proceedings in which he represents his client, and that the attorney may pocket the profit therefrom, here $19,840.27 being 106% of $18,600.00 invested for fifteen months.

These holdings are in direct conflict with the contrary holdings of other Circuits, particularly the Second and Tenth *in Commonwealth McHarg,* 282 Fed. 560, CCA 2, and *Niehart* v. *Buek,* 50 F 2d 367, CCA 10, and the solemn declarations of this court. *Texas* v. *White* (*In re Paschal*), 10 Wall. 483, in the middle of the last paragraph of the opinion. *Stockton* v. *Ford,* 11 How. 232, 236. *Michoud* v. *Girod,* 4 How. 551. *Jackson* v. *Smith,* 254 US 587.

2

The Court of Appeals erred in holding that the attorney's associate in the purchase of the claim against the client may share in the profits of the investment. *Jackson* v. *Smith,* 254 US 587.

3

The Court of Appeals erred in holding that secured claims against a farmer debtor bankrupt bear interest after adjudication and after the sale of the security and the proceeds are paid into court. *Sexton* v. *Dreyfus*, 219 US 339, 334. *City of New York* v. *Saper*, 336 US 328.

4

The Court of Appeals erred in holding that after the farmer debtor moves to pay secured claims in full out of available monies amply sufficient lying in the registry of the court they continue to bear interest. Rule 36, paragraph 2, Rules of this Court. Rule 73d, Rules of Civil Procedure.

5

The Court of Appeals erred in holding that the trustee in a Virginia deed of trust (mortgage) who did not execute the trust may nevertheless be paid a commission or compensation out of the security. *Dillard* v. *Serpell*, 138 Va. 694.

6

The Court of Appeals erred in holding that an attorney for a trustee named in a Virginia deed of trust (mortgage), who is the sole holder of the note secured by the trust, may be paid a fee out of the security.

7

The Court of Appeals erred in holding that when the only controversy on appeal is the disposition of $45,954.52 in money the court may continue to hold all of the money deposited in court, amounting to $216,110.35 in lieu of a supersedeas bond which the parties have moved the court to fix, thus preventing the disbursement of $136,788.14 not in controversy which would stop the running of in-

terest. Rule 36, paragraph 2, of the Rules of this court and Rule 73d of the Rules of Civil Procedure.

8

The Court of Appeals erred in holding that appraisers in a farmer debtor proceeding may be paid without any order of the court or any evidence of the amount of services performed. General Order XLV. *Re Kaufman, Inc.*, 21 F 2d 799.

9

The Court of Appeals erred in holding that the sheriff of a state court may be paid without any evidence of services rendered.

V

SUMMARY OF THE ARGUMENT

1

Summary of Point One

PURCHASE BY ATTORNEY AND ASSOCIATE OF CLAIM AGAINST HIS CLIENT

(Specifications 1 and 2)

An attorney may not buy up a claim against his client and pocket the profit from his investment.

The relationship between attorney and client is a highly fiduciary one of trust, of a very delicate, exacting and confidential nature, requiring the highest degree of fidelity and good faith. It is a relation of great responsibility and often of hardship.

If he does buy up a claim against his client and there is a profit, he holds the profit for the client.

The associate of an attorney in such a venture may not keep any share of the profit.

2

Summary of Point Two

INTEREST ON SECURED CLAIMS

(Specifications 3 and 4)

Interest is paid by a borrower for the use of money. When the money is paid into court the borrower's obligation to pay interest ceases because he has no longer any control of it. The borrower has no control and no responsibility. The lender must look to the court and the court does not pay interest.

Over and above this, when the debtor informs the court there is no controversy over the statement rendered by the lender and requests that the secured claims be paid, certainly it is not equity to keep charging interest against him. The principle is essentially like that in *Borchard* v. *California Bank*, 310 US 311. Here the mortgage holder could have had his money, but thought it more profitable let let his money draw 5½%.

3

Summary of Point Three

(Specifications 5 and 6)

PAYING TRUSTEE IN DEED OF TRUST AND HIS ATTORNEY

Of two trustees named in the Virginia deed of trust, one was the sole note holder and was compelled to resign. The other initiated sale of the real estate "Oak Hill" in foreclosure but never sold it. The attorney for both trustees claims a fee.

The Virginia law bases the compensation of the trustee in a deed of trust upon the sale of the security. No sale was made and no compensation or fee can be awarded.

4

Summary of Point Four

(Specification 7)

THE COURT MAY NOT HOLD MONEY NOT IN ISSUE IN LIEU OF A SUPERSEDEAS BOND

The parties moved the court to fix the amount of the supersedeas bond upon appeal to be paid by the appellant. Instead of doing so, the court decreed that all of the funds in court, amounting to $216,111.35 be retained whereas $136,788.15 was not involved in the appeal and the appellant and first creditors agreed on the amount due them and the debtor moved the court to pay them.

Such failure to fix a supersedeas bond violates Rule 36, paragraph 2 of the Rules of this Court and also violates Rule 73 d of the Rules of Civil Procedure.

5

Summary of Point Five

(Specifications 8 and 9)

BANKRUPTCY COURT MAY NOT PAY APPRAISERS WITHOUT ORDER OR EVIDENCE NOR MAY A SHERIFF BE PAID WITHOUT PROOF OF SERVICE

General Order XLV requires specific provision for the compensation of appraisers to be made in the order appointing them and a sheriff who has already been compensated cannot be repeatedly paid more money for services not proved to have been rendered.

VI

ARGUMENT

1

Argument of Point One

(Specifications 1 and 2)

PURCHASE BY ATTORNEY AND ASSOCIATE OF CLAIM AGAINST CLIENT

THE FACTS

Because of the great importance of this subject the facts under this heading are somewhat extensively reviewed.

Among the proved claims against Mr. Littleton in the farmer debtor case were two held by his son, Frank C. Littleton, Jr.

One was a non-negotiable note for $27,200.92 which was secured by two mortgages, namely a second mortgage against the "Oak Hill" real estate and a first mortgage against the historical objects in "Oak Hill" Mansion House. The other claim was a judgment for $1,844.38. R 84.

On February 5, 1948 Robert H. McNeill, who was Mr. Littleton Sr.'s attorney in the farmer debtor case, joined with Coleman C. Gore in purchasing these claims from the son for $18,600.00. R 92, second question and answer. They paid down only $5,000.00. The last payment was not made until September 18, 1948. Trustees' certificate: R 20A to 21A. R 14A, indented paragraph at end of page. This was 16 days *after* the sale of the real estate on September 2, 1948. R 27A. R 57A, paragraph 3 of section V. It sold then for $220,000.00 which was $23,595.47 more than *all* debts, costs and expenses of the estate. R 76A, item Q. And the chattels remained unsold. R 52A.

Order of Distribution

Fifteen months later, May 1, 1949, the date as of which these claims were ordered paid by the District Court, they amounted to $38,440.27. R 75A, item F. (Judgment $34.01, note $38,406.26, total $38,440.28.)

Attorney McNeill and his associate Gore had been considering the purchase of these two claims during the month before they bought them. The purchase occurred February 5, 1948. R 16A, Ex. A. Gore had the subject before him in December 1947 or January 1948, "Right along after Christmas time." R 15A, top of page. Gore interested McNeill in the deal in January and they then knew they could buy the claims for $18,600.00. R 95, first two questions and answers.

They knew the claims were amply secured, would be fully paid, and expected to make a profit. McNeill: "I thought I had a chance to make a profit." R 106, question and answer just before the words : "THE WITNESS". Gore: "I also discussed with him" (McNeill) "the fact that it was a first mortgage on the furniture and I felt there was ample value there to protect this note." R 98, second to last paragraph. On May 15, 1948 attorney McNeill's firm wrote the client that, "In your case it has developed that you have more than sufficient property to pay all debts." R 32A, second sentence in paragraph beginning: "The statute." Attorney McNeill on February 4, 1948, the day before the purchase, assured his client the obligation was worth 100 cents on the dollar. R 22A, just before paragraph 3.

Attorney McNeill and his associate Gore were familiar with the surrounding circumstances because they had worked for "months and months" to finance "Oak Hill", and although he denied it, Gore had been agent for Mr. Littleton Sr. in attempts to finance it. Gore: R 92, second question and answer after the words: "BY MR. STILL-

SON HALL." McNeill: R 110, first question and answer. Gore: R 90, the italicized paragraph near the *bottom* of the page.

The District Court and the Court of Appeals stressed the letter of February 4, 1948 addressed: "To Whom It May Concern", signed by Frank C. Littleton, Sr. That letter is at R 84. That letter was prepared by attorney McNeill and his associate Gore and presented to Mr. Littleton, Sr. for signature. It contains the words "or to purchase the same themselves", referring to McNeill and Gore, in a sentence reciting that it is made to enable McNeill and Gore to negotiate a sale. R 85, paragraph at top of page.

The testimony of attorney McNeill and Gore concerning the drafting of this letter is somewhat conflicting and indefinite. Gore: "A letter was drawn" . . . "and handed to Judge McNeill and myself" . . . R 89, italicized paragraph. Attorney McNeill: "I think he" (Gore) "dictated it in my outer office". R 101, last full paragraph on page. Gore: "I think I dictated the letter" . . . R 91, bottom of page. Mr. Littleton says his attorney, McNeill, dictated it. R 22A, 10th and 11th lines.

The next day, February 5, 1948, the purchase of the two claims from the son was consummated. R 16A.

There is no evidence that Mr. Littleton, Sr., was present when the contract of February 5, 1948 (R 16A) was drawn and signed. Gore says it was drafted by McNeill and himself in *Gore's office.* R 97, last question and answer on the page. Attorney McNeill says Gore dictated it. R 106, last question and answer on the page. And that Gore dictated it in attorney *McNeill's office.* R 101, last full paragraph on the page. Attorney Fuller, attorney McNeill's partner says: "*To my knowledge* he was" given a copy of the contract. "I am not sure whether he was present." R 108, bottom of page to top of page

R 109. "I say I *thought* he received a copy." R 109, middle of page.

The father, Mr. Littleton, Sr., the farmer debtor, did not then, or for a long time afterwards, know what the terms of the purchase were. He repeatedly wrote his attorney, McNeill, for full details without success. See "Debtor's Sworn Statement in Opposition," to the allowance of the claim beginning on R 21A, at R 23A where he states he did not know the details until March 14, 1949. His repeated requests for them are referred to at R 23A to 25A, paragraphs (a) to (j). The full letters are at R 27A, Ex. A to R 40, Ex. J.

Attorney McNeill says he told his client that if the client wanted detailed information he could get it from the son or from Gore. R 102, middle of page.

He failed to learn the price paid for the claims until the "Proof of Amount Due" Attorney McNeill and his associate Gore, executed March 14, 1949 (R 15A, bottom of page) was presented at the hearing before the Conciliation Commissioner on March 14, 1949. He then executed and filed, in the same month, his "Debtor's Sworn Statement in Opposition" to the allowance of that claim. R 21A.

THE LAW

The foregoing, somewhat extensive, factual account is presented because of the extreme importance to the public of the subject of law it presents.

It is a very zealously, and jealously, guarded principle of Anglo-American jurisprudence that a member of the bar shall not buy up claims against his client. The prescription is precisely the same as that against the judge on the bench. Both are much more strictly forbidding than the rule that every fiduciary is prohibited from speculating in the estate of his cestui que trust.

"The relation between attorney and client is highly

fiduciary in its nature and of a very delicate, exacting and confidential character requiring a very high degree of fidelity and good faith." 5 American Jurisprudence, "Attorneys at Law," Section 45.

Section 58: "It is contrary to the policy of the law, and also contrary to the principles of equity to permit an attorney at law to occupy at the same time and in the same transaction the antagonistic and wholly incompatible position of advisor to his client concerning pending litigation threatening his title to his property and that of purchaser of such property in opposition to the title of his client."

The English version even forbids an attorney to receive an acknowledgment of an outlawed debt. 1 K B (Eng.) 242; Annotated Cases 1916E, 434.

7 Corpus Juris Secundum, "Attorney and Client" at page 958 quoting 6 Corpus Juris at page 683 says: "The duty of an attorney to his clients is one of great delicacy and responsibility and sometimes of apparent hardship."

"No rule is better settled than that an attorney cannot make use of knowledge or information acquired by him through his professional relations with his client, or in the conduct of his client's business to his own advantage or profit." 7 Corpus Juris Secundum, page 958. And at page 957: An attorney "occupies the position of the highest trust and confidence, so that, in all his relations and dealings with his client, it is his duty to exercise the utmost honesty, good faith, fairness, integrity, and fidelity, and if he does not, he is strictly liable or accountable to his client. He is bound to conduct himself as a fiduciary or trustee occupying the highest position of trust and confidence."

5 American Jurisprudence, "Attorneys at Law," Section 59, page 294: "An attorney employed to sustain his client's right or title to property cannot purchase for him-

self any outstanding or opposing title against the interest of his client, either before or after the cause is ended, whether during the time the client holds for himself or after he has conveyed his interest; any such purchase will inure to the benefit of the client or his vendee or assignee. In such case the attorney can obtain, at most, no more than the sum actually paid by him for such property."

Parkerson v. *Borst*, 264 Fed. 761, CCA 5, page 765. "It is a principle of law, of universal application that all relations of agency are affected with a trust, and that of such relations none is more exacting in its requirements, nor compelling in the performance of them than the relation of attorney and client. English and American legal history points with unwavering fixity to the recognition at all times, and in all places of the necessity for the establishment and maintenance of the relation of attorney and client upon a basis of the utmost trust and confidence on the part of the client, and of the utmost fidelity and singleness of purpose on the part of counsel. In no relation is the scriptural maxim that no man can serve two masters, more rigidly enforced than in that of attorney and client, nor is there any relation where disregard of it more certainly nullifies the transaction." And filing a claim in bankruptcy and receiving dividends on it was no waiver or estoppel against the client.

Texas v. *White*, 10 Wall. (US) 483: "The relations between counsel and client are of a very delicate and confidential character, and unless the utmost confidence prevails between them, the client's interests must necessarily suffer."

Michoud v. *Girod*, 4 How. (US) 551 at 555: "And, therefore, if a trustee, though strictly honest, should buy for himself an estate from his cestui que trust, and then should sell it for more, according to the rules of a court of equity, from general policy, and *not from any peculiar imputation of fraud*, he would be held still to remain a

trustee to all intents and purposes, and not be permitted to sell it to or for himself."

Stockton v. *Ford,* 11 How. (US) 232, at 246: "There are few of the business relations of life involving a higher trust and confidence than that of an attorney or client, or, generally speaking, one more honorably or faithfully discharged; few more anxiously guarded by the law, or governed by sterner principles of morality or justice; and it is the duty of the court to administer them in a corresponding spirit, and to be watchful and industrious, to see that confidence thus reposed shall not be used to the detriment or prejudice of the rights of the party bestowing it."

Commonwealth Finance Company v. *McHarg,* 282 Fed. 560, CCA 2: Page 564: "But it is to be kept in mind that McHarg was not merely an agent or quasi trustee. *He was also plaintiff's attorney.* The law makes it the duty of an attorney to exercise in all his relations to his client the most scrupulous good faith and fidelity. He is bound to exercise the highest degree of honor, integrity and fidelity to his client's interest." (Citations) "The relation is one of peculiar and exceptional confidence, so much so that the courts have held that a *gift made by a client to his attorney* during the continuance of the relationship *to be absolutely void.*" (Citing cases)

Neihart v. *Buek,* 50 Fed. 2d 367, CCA 10: An attorney who had not been paid for legal services already rendered and whose client was unable to pay for services to be rendered received a deed from the client to a heavily encumbered farm as his fee. The attorney conducted the litigation and claimed the right to redeem the farm from mortgage. It was held that he held the deed as trustee and the right to redeem was in the heirs of the client.

White Earth Creamery Company v. *Edmondson,* 49 ND 394, 191 NW 662: An attorney for the Creamery Company bought an assignment a mortgage against his client. "His position required the exercise of the utmost good faith".

. . . "By purchasing such assignment of the mortgage he became a trustee for his client, the Creamery, subject only to a lien for such fees as might be due him." . . . "Properly the trial court determined the foreclosure to be illegal and void."

Heffern v. *Jayne,* 31 Ind. 463 at page 465: "An attorney acts in a fiduciary capacity. The relation between an attorney and his client is one of great confidence and the law imposes on the attorney the highest degree of good faith." Bankruptcy of the attorney does not discharge his obligation to return money held for his client.

Berman v. *Coakley,* 243 Mass. 348, 137 NE 667: "An attorney at law has been said to be a public officer. He is an officer of the court sworn to aid in the administration of justice and to act with all good fidelity both as to his clients and the court. The public have a deep and vital interest in his integrity." . . . "Public policy hardly can touch matters of more general concern than the maintenance of an untarnished standard of conduct by the attorney at law toward his client. The attorney and client do not deal with each other at arm's length." Referring to relation between attorney and client: "That relation is highly fiduciary in its nature."

In re Dunn, 205 NY 398; 98 NE 914: "That the relation between attorney and client is one of unusual character has been so often affirmed that a statement of the proposition is commonplace." The elements of trust and confidence and the undivided loyalty and devotion of the attorney "render the relationship a personal and confidential one and make its obligations on the part of the attorney of the most exacting kind."

Both attorney McNeill and Gore are jointly and severally liable for any profits in the transaction. This is definitely settled by the case of *Jackson* v. *Smith,* 254 US 587, where an attorney in a case and two laymen joined in a venture to invest in property to be bought by one of them

at a sale of the property involved in the case. There was no evidence of improper influence to prevent competition or to bring about the sale in preference to themselves over anyone else. The sale was fairly conducted; there was competitive bidding and their man was the highest bidder.

The court said through Justice Brandeis who delivered the opinion: "Ambrose had, as receiver, the affirmative duty to endeavor to realize the largest possible amount from the Schwab note. *Baker* v. *Schofield*, 243 US 114; *Robertson* v. *Chapman*, 152 US 673, 681. To this end it was his duty to endeavor to have the land, when sold under the trustee, bring the largest possible price. *J. H. Lane and Co.* v. *Maple Cotton Mill*, 232 Fed. Rep. 421. When he agreed with Smith and Wilson to join in the purchase, if Wilson should become the successful bidder, he placed himself in a position in which his personal interests were or might be, antagonistic to his trust. *Michoud* v. *Girod*, 4 How. 503, 552. It became to his personal interest that the purchase should be made by Wilson for the lowest possible price. The course taken was one which a fiduciary could not legally pursue. *Magruder* v. *Drury*, 235 US 106, 119, 120. Since he did not pursue it and profits resulted, the law made him accountable to the trust estate for all the profits obtained by him and those who were associated with him in the matter, *although the estate may not have been injured thereby*. *Magruder* v. *Drury*, 235 US 106. And others who knowingly joined a fiduciary in such an enterprise likewise become jointly and severally liable with him for such profits. *Emery* v. *Parrott*, 107 Mass. 95, 103; *Zinc Carbonite Co.* v. *First National Bank*, 103 Wis. 125, 134; *Lomita Land & Water Co.* v. *Robinson*, 154 Calif. 36. Wilson and Smith are therefore jointly and severally liable for all profits resulting from the purchase; the former although he had no other relations to the estate; the latter, without regard to the fact that he was also *counsel for the receiver.*"

The opinion of the District Judge and that in the Court

of Appeals dwelt upon the fact that the estate suffered no loss—that the debtor was not harmed. **That is not the point.**

When an attorney invests in a matter involved in his client's estate or in connection with his client's debts, from that moment his interest becomes divided and he can no longer serve his client's interests with singleness of purpose and wholehearted fidelity that his supreme loyalty to his client demands.

If the law of the longstanding principle that an attorney occupies a position of the highest trust and confidence, with a duty of great delicacy and responsibility towards his client, is to be watered down to an ex post facto judgment of his conduct based upon ultimate results, the door is open to callous disregard of that relationship. Attorneys and associates who are willing to "take a chance" will in some instances be whitewashed. Those who are lucky will be the exceptions that will be disregarded by those who are sure they can devise "the perfect crime."

No device could be more surely calculated to lower the high estate of bench and bar in public estimation.

2

Argument of Point Two

(Specifications 3 and 4)

THAT INTEREST ON SECURED CLAIMS SHOULD NOT RUN INDEFINITELY

THAT WHEN THERE ARE AMPLE FUNDS IN COURT, FREE OF ALL CONTROVERSY, UNDISPUTED CLAIMS SHOULD BE PAID TO STOP INTEREST

THE FACTS

The deed of trust note bore 5½% interest. R 49A, the long paragraph at the top of the page. This was at all

times during the proceedings, and still is, more than the market price of money.

The "Oak Hill" real estate was sold on September 2, 1948 for $220,000.00 which was adequate to pay all claims, costs and expenses and besides leave remaining $23,599.47 to be returned to the petitioner farmer debtor, Mr. Littleton. Order of Distribution, 76A, item Q. Date of Sale, R 27A, paragraph 7, R 57A, paragraph 3 of section V.

Mr. Littleton moved the court to pay all secured claims out of these proceeds so as to stop interest, stating that statements had been rendered by the creditors showing the whole total to be much less than the net proceeds of the sale of "Oak Hill." R 8A and 9A. Amount of secured claims: $136,788.14; net proceeds of sale: $116,277.21. R 11A, end of last full paragraph. Order of Distribution showing $216,111.35 including $23,595.47 refund to Mr. Littleton: R 76A, item Q and total.

THE LAW

This court a year ago in *City of New York* v. *Saper*, 336 US 328, quoted the widely accepted law as follows: "More than forty years ago Mr. Justice Holmes wrote for this court that the rule stopping interest at bankruptcy had been followed for more than a century and a half. He said the rule was not a matter of legislative command or statutory construction but, rather, a fundamental principle of the English bankruptcy system which we copied. *Sexton* v. *Dreyfus*, 219 US 339, 344. Our present statute contains no provision expressly repudiating that principle or allowing an exception in favor of tax claims. Every logical implication from relevant provisions is to the contrary."

It may be conceded that where, as here, there is ample security to pay principle and interest, interest will run as long as the farmer debtor has the use of the property under the farmer debtor law, section 75 of the Bankruptcy Act;

Title 11, section 203, which, contrary to general bankruptcy, keeps the property within the control of the debtor.

"Since interest is allowed usually on the theory that the debtor is in default and has the use of the claimant's money, the general rule is that when the fund is paid into court and cannot be paid out without an order of the court, such fund will not bear interest during the time it is within the custody of the court. Interest will not be allowed against the defendant in a foreclosure suit on the amount tendered and deposited in court." 30 American Jurisprudence, "Interest", page 44, section 53.

When the property was sold on September 2, 1948 a new situation arose; the debtor no longer had the property and the proceeds were taken over by the court.

The money derived from the sale of the property was placed in the registry on the court December 16, 1948. "Order": R 11A, in the middle of the second paragraph. This payment of the funds into the registry of the court was more than sufficient to pay the interest and the principal on the mortgage notes, and in excess of all claims in the case.

In *Himely* v. *Rose,* 5 Cranch (US) 313, Chief Justice Marshall said on the subject of interest at page 317: "If the money remains in the possesion of the court, it carries no interest."

In *Codar* v. *Arts,* 152 Fed. 943, the Court of Appeals held likewise and this court sustained it, saying in *Codar* v. *Arts,* 213 US 233, 245: "Nor do we think the Circuit Court of Appeals erred in holding that inasmuch as the estate was ample for that purpose, Arts was entitled to interest on his mortgage debt," up to the time the proceeds of sale were paid into court.

No reason can be suggested why interest at 5½%, far above the market rate of money, should be kept running after the debtor put before the court the statement rendered by the secured creditors showing their total claims and requesting that they be paid to stop interest, there being no controversy over the amount.

3

Argument of Point Three

(Specifications 5 and 6)

THE FACTS

Two trustees were named in the deed of trust (mortgage of "Oak Hill"). They were Rust and Metzger. R 44A, paragraph 2. They advertised the security for sale in foreclosure in state proceedings. R 45A, paragraph 3. Upon objection by the debtor on the ground of self interest of Rust as trustee and improper advertisement, the sale was enjoined. R 45A, paragraph 3. R 65A, 5th line. The district court denied compensation to Rust. R 46A, last sentence at end of long paragraph.

Metzger proceeded again with foreclosure until the invocation of the federal jurisdiction. R 46A, end of paragraph at top of page.

The attorney for Rust and for Metzger in their trusteeship proceedings was A. R. Ahalt.

Metzger was awarded by the district court below $1,000.00 as trustee's compensation and Ahalt $500.00 for services to the trustees, all being for services in the state proceedings prior to the attachment of federal jurisdiction. Order of Distribution: R 75, items (D) (E). Opinion of District Court on Order of Distribution; R 63A, section 3.

The trustees named in the deed of trust never executed the trust. The only sale made was by other trustees

appointed in the Federal Court, Garrett and Smith. R 2A. They were ordered paid $1170.00 each, a total of $2340.00 for making sale. R 3A, items 9 and 10.

THE LAW

It would seem, on the face, that it is unlawful that two sets of trustees should each be paid for making sale of mortgage property when but one sale was made.

Indeed, the law of Virginia provides for compensation to a trustee named in a deed of trust only upon his making sale of the property: No sale, no compensation.

As said by the Supreme Court of Virginia as to a similar deed of trust in *Dillard* v. *Serpel,* 138 Va. 694, 703: "Stated succinctly, notwithstanding the general rule as to *active trust* the compensation of a trustee in such deeds as these is conditioned upon a sale of the property, and then is determined either by the contract or the deed itself, or by the Virginia statute which controls where there is no specific agreement."

There is no provision in the deed of trust for compensation or attorney's fees. On the contrary, the provisions of section 5167 of the Virginia Code are especially applicable. This provision is discussed in the *Dillard* v. *Serpel* case at page 701 where it is said the only provision for compensation of the trustee is in case he sells the property: "For this service, and for no other, this statute provides."

The Virginia Court further adopted the language of the trial judge as to the right of commissions as follows: Page 705: "There can be no compensation by way of commissions for the obvious reason that no sale has occurred."

The trustee under a deed of trust merely to secure the payment of a debt must rely for compensation either upon the statute or upon the contract expressed in the deed of trust. The mere advertising of the property for sale under

decree of a court is neither a part nor a complete execution of the trust and therefore the trustee is not entitled to compensation.

As to Ahalt who in the state court represented Rust who presumed to act as sole note holder and as trustee, and Metzger who never executed his trust, he was in an antagonistic and wholly inconsistent position. He could no more represent both the trustees and the creditor under the deed of trust than Mr. Rust could act as trustee for himself and as the sole creditor thereunder.

4

Argument of Point Four

(Specification 7)

The Court refused to fix a supersedeas bond and held $216,111.35 of which $136,788.14 was not appealed.

THE FACTS

Despite the motion of the parties to the court to fix a supersedeas bond to be met by the appellant, the court ordered all funds, "$216,110.35" (really $216,111.35) to be held. R 79A to 80A. The effect was to keep the entire $136,788.14 of first creditors' money in court thus depriving them of it and subjecting the debtor to further claims for interest in spite of the fact that he requested the court to pay it out as undisputed. R 8A.

THE LAW

It is the duty of the district court to fix a supersedeas bond on appeal. Rule 36, paragraph 2, of the Rules of this Court as well as Rule 73d of the Rules of Civil Procedure require the district court to set the bond on appeal.

5

Argument of Point Five

(Specifications 8 and 9)

A Bankruptcy Court May Not Pay Appraiser Without Order of Appointment Fixing Compensation

Nor May a Sheriff Be Paid Without Proof of Services Rendered

THE FACTS

Six appraisers in the district court were ordered paid a total of $750, or $100 to $150 each, for appraisal of real estate and chattels. R 78A, items (1) to (6). No order fixed the amount of compensation upon their employment.

The state sheriff was ordered paid $50 long after the case was under the federal jurisdiction and after he had already been paid $673 in the sale of the real estate. R 2A, item 5.

THE LAW

No compensation was fixed by the Conciliation Commissioner or the Judge in employing appraisers. General Order XLV reads: "No auctioneer or accountant shall be employed by a receiver or trustee except upon an order of the court expressly fixing the amount of the compensation or the rate thereof. *The compensation of the appraisers shall be provided for in like manner in the order appointing them.*"

Judge Thatcher in *In re Benjamin Kaufman, Inc.*, 21 Fed. 2d 799, said: "Unfortunately, the referee's order appointing the appraisers does not fix their compensation or the rate or measure thereof. General Order XLV requires that this be done in the order appointing them. I

do not see how the failure to comply with the general order can be overlooked without ignoring it entirely and defeating the practice which it prescribes. The allowance recommended for the appraisers must therefore be disallowed."

As to the sheriff, it is inconceivable why the federal court, provided with a United States Marshal, should pay a state sheriff $50 who has already been compensated $673 out of the funds from the sale of the real estate.

CONCLUSION

The writ should be allowed for these compelling reasons important to the public and important to the maintenance of unity in federal judicial holdings:

The decisions below would permit an attorney to speculate in the affairs of his client which were involved in the very proceedings in which the attorney represented his client.

They would permit the attorney not only to keep the profits of the violation of his trust and of his high fidelity to his client and share such profits with his associate.

They set a rule as to the running of interest in bankruptcy not sanctioned by this court and contrary to the principles enunciated consistently by this court over a long period.

They sanction the withholding by the courts of large sums not in dispute when creditors and debtor are ready to have them paid.

They sanction the payment of state trustees in deeds of trust and fees to their counsel who are not authorized by the state to be paid.

They countenance the payment to appraisers and to state sheriff without authority.

For all the reasons cited in the foregoing petition and brief, the petitioner prays for a writ to the Fourth Circuit.

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